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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TREDAIL GRAY, Defendant and Appellant.	B210052 (Los Angeles County Super. Ct. No. KA076506)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tia Fisher, Judge. Affirmed.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Tredail Gray, appeals the judgment entered following his conviction, by jury trial, for assault on a peace officer with a semiautomatic firearm (2 counts), attempted premeditated murder, shooting at an occupied motor vehicle, and possession of a firearm by felon, with firearm enhancements (Pen. Code, §§ 245, subd. (d)(2), 664/187, 246, 12021, 12022.5, 12022.53).[1] Gray was sentenced to state prison for a term of 43 years to life.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

a. *The November 2005 incident.*

On November 3, 2005, Officer William Luemmen of the Pomona Police Department was driving a marked police car when he noticed a red Pontiac Firebird in front of him. He ran the license plate and determined the owner of the Firebird had an outstanding arrest warrant. Luemmen saw the Firebird pull into a driveway at 683 Elaine Street. Defendant Gray got out of the passenger side and Justin Liddell got out of the driver's side. Gray and Liddell walked up to a house and knocked on the door. Luemmen got out of his patrol car and called out to Liddell. Gray reached into the pocket of his jacket and pulled out a clear jar which he threw into some bushes.

Thinking Gray might have been reaching for a gun, Luemmen drew his own weapon. Once he saw the jar, Luemmen lowered his gun. Gray then grabbed his waistband and Luemmen ordered him to come forward. Luemmen saw the black handle of what appeared to be a semiautomatic handgun in Gray's waistband. Gray climbed over a fence and evaded capture. Liddell was taken into custody.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

Luemmen recognized Gray from previous contacts they had had. He once responded to Gray's parents' house because Gray and his brother, Trevail, had been in a dispute. On another occasion, Luemmen saw Gray when he responded to a residence in Ontario. The two brothers looked nothing alike: Tredail Gray is at least six feet tall, while Trevail Gray is only about five foot five. Luemmen testified he could tell them apart and he was certain he had seen Tredail on November 3, 2005.

Luemmen spoke to Otis Wishum, who lived at the house where Gray and Liddell had been knocking. Wishum said the man who fled was his cousin, Tredail.

Luemmen prepared a report of the incident and the case was assigned to Pomona Police Detective Michael Lange, who obtained an arrest warrant alleging a violation of section 148, a misdemeanor charge of obstructing or resisting a peace officer. Although Lange knew where Gray lived, he did not try to arrest him because in Pomona misdemeanor warrants are only enforced when officers come into contact with the suspected perpetrators.

Ultimately, Gray was charged with misdemeanor obstruction of a peace officer (§ 148) for the November 2005 incident, but at trial he was acquitted on this count.

b. *The September 2006 incident.*

In the early afternoon of September 21, 2006, Detective Lange and his partner, Detective Greg Freeman, were on patrol. They were each wearing a blue polo shirt which had Pomona Police Department patches on both arms. They were also wearing cloth badges which said Police Officer for City of Pomona. The word "police" was printed on the back of their shirts in three-inch letters. Freeman was driving a "dual purpose" Crown Victoria, which did not have any clearly marked police insignias, although it was equipped with forward-facing red and blue flashing lights. According to Lange, "[s]ome people that have interaction[s] with law enforcement on a regular basis know that vehicle." Freeman and Lange were accompanied by Los Angeles County Deputy District Attorney Peter Bliss, who was sitting in the rear, caged section of the patrol car. They were preparing to gather information for search warrants in an unrelated case.

The detectives spotted a Ford Expedition SUV stopped in a traffic lane with the driver's door open. There were two African-American men standing in the road near the driver's door. The men appeared to be startled when they looked toward the police car. Both detectives immediately recognized one of the two men as defendant Gray, who made a motion of grabbing at his waistband. This caused the detectives to believe Gray was armed. The other man, later identified as Jerry Wade, ran off.

Lange chased after Wade. Gray jumped into the driver's seat of the SUV. The SUV and the patrol car were positioned nose to nose. Freeman activated his forward-facing red and blue lights, pointed at Gray, and yelled, "Tredail stop, Tredail stop." Freeman testified he did not bother to yell "police" because, based on their prior contacts, Gray "knows I'm a police officer, knows who I am specifically."

Freeman's prior contacts included two or three traffic stops and two arrests. On one occasion, Freeman was part of a team executing an arrest warrant for Gray at a house in Ontario. Gray was found hiding in the attic. Freeman drove Gray to the police station in a Crown Victoria similar to the one he was driving in September 2006. Another time, in 2002 or 2003, Freeman took Gray into custody while serving a search warrant at his uncle's house.

Gray backed the SUV up and drove around the police car. Freeman yelled for Lange to come back because he was worried about having Bliss, a civilian, in the patrol car. Anticipating Gray would drive home, Freeman took a different route and turned onto Gray's street just as Gray was coming from the opposite direction. Gray stopped the SUV in the middle of the street and jumped out with a gun in his hand. He ran toward his house. Lange jumped out of the patrol car and chased after him, yelling that Gray had a gun. Gray ran through his front yard and then toward his backyard or a rear alley.

Freeman drove around to the alley behind Gray's house, hoping to cut off his escape route. He saw Gray hopping over his back fence into the alley. Gray was carrying a black Glock semiautomatic with an extended magazine. Gray ran through the alley to a chain-link fence, pushed off the fence and came toward the passenger side of the patrol car. Gray raised his gun and pointed it directly at Freeman, who fired several

shots at Gray. Freeman heard other shots and glass breaking; he believed Gray was shooting at the patrol car.

Bliss saw Gray bounce off the chain-link fence, turn and point his gun at the patrol car. When Bliss saw Gray's gun, he drew his own weapon. Bliss had a concealed weapons permit and was carrying his gun that day. Bliss fired 10 rounds at Gray through the rear passenger window.

Freeman got out of the patrol car and continued to shoot at Gray. Gray was facing Freeman, walking backward, and shooting at him. Freeman kept shooting until he ran out of ammunition.

In the meantime, Lange had decided not to follow when Gray ran toward the back of his house because he feared an ambush. So Lange stayed in front of Gray's house. When he heard shots being fired from the alley, Lange ran toward the gunfire. Rounding a corner, he saw Freeman shooting toward the alley, and he could hear other shots being fired. There were bullet holes in the patrol car. Lange ran to Freeman's side and looked down the alley. He saw Gray leaning against a chain-link fence and facing them with a gun in his hand. Lange fired three rounds at Gray, who was holding his gun pointed "down in a 45-degree angle." Lange testified he fired in self-defense because "[t]he ability to come up and shoot is so fast, and I knew that. And I knew that even though I had my gun out, the probability of him getting off a shot quicker than me was good. And at this time it was an immediate defense of my life and Detective Freeman's life, so I took the shots."

After Lange fired, Gray hopped over the fence and fled. He was eventually found hiding in the neighborhood. He was treated for gunshot wounds.

2. *Defense evidence.*

a. *November 2005 incident.*

Gray's brother, Trevail, testified he was with his friend Justin Liddell on November 3, 2005. They were in a red Pontiac Firebird; Liddell was driving and Trevail was in the passenger seat. Liddell turned onto the street where Trevail's cousin, Odis Wishum, lived. A police car was following them. Liddell told Trevail he had a gun.

Trevail got out of the car and went to Wishum's front door. He knocked, but Wishum did not answer. Trevail heard an officer giving orders to Liddell. When Wishum didn't answer the door, Trevail ran away. Trevail admitted he had prior convictions for theft, assault with a deadly weapon, and resisting arrest.

Liddell testified he has known defendant Tredail Gray his entire life. On November 3, 2005, Liddell was with Tredail's brother Trevail, not with Tredail. Their car was stopped by the police. Liddell had a gun in his jacket.

Odis Wishum testified he heard someone knocking on his door that afternoon. He opened the door and saw a police car. He also saw a red car, as well as his cousin, Trevail Gray. Trevail turned around and ran off.

b. *September 2006 incident.*

Jerry Wade testified he took the bus from Pasadena to Pomona on September 21, 2006. He saw Tredail Gray standing by a Ford Expedition. Gray said he was having trouble with a tire. Wade did not have a gun, and neither did Gray. A dark blue car sped toward them. Wade didn't think this was a police car. The passenger door opened and someone got out. Wade was scared, so he ran off. As he fled, he heard a gunshot. He did not hear anyone call out, "Tredail stop."

Angela Dorsey lived in the neighborhood. Although she didn't know Gray, she knew his mother and sister. That afternoon she saw a blue "narc car" coming fast down the street. Then she heard the same car going through the alley behind her house. She heard gunshots and saw an officer shooting a gun. Dorsey then saw Gray jump over the fence into his backyard. She did not see a weapon in his hands.

Darcie Schwartz was acquainted with Gray and his family. That afternoon, she looked out her front door and saw Gray checking the rear tire of an SUV. Another African-American man stood near the SUV. Then a blue car drove up fast. The passenger jumped out and began chasing Gray's companion. The driver of the blue car jumped out and fired a shot. There were no lights or sirens activated on the blue car. Gray got into the SUV and drove off. The blue car drove to an alley and stopped. There was more gunfire.

Clarise Dear saw an SUV come to a stop on the wrong side of the street. Gray exited the SUV running. Dear did not see anything in his hands. A blue car pulled up near the SUV. A man dressed like a police officer got out and the blue car drove off. Later, Dear saw the driver of the blue car shooting down an alley.

Los Angeles County Deputy Sheriff Timothy Cain interviewed Detectives Lange and Freeman on the day of the shooting. Freeman said Gray fired his weapon and that the officers shot back. Lange did not say who fired first. Lange said that when he shot at Gray, Gray's gun was pointing down. Neither Lange nor Freeman said they had identified themselves as police officers to Gray.

3. *Rebuttal evidence.*

There did not appear to be any damage to the tires of the Ford Expedition.

CONTENTIONS

1. The trial court erred by denying a motion to recuse the entire Los Angeles County District Attorney's Office.

2. The trial court erred by allowing joinder of the two incidents.

3. The trial court erred by admitting evidence of Gray's 2003 arrest.

4. There was insufficient evidence to sustain the finding that the attempted murders were premeditated.

5. There was insufficient evidence to sustain the conviction for assault on a peace officer with a semiautomatic firearm.

6. The prosecutor committed misconduct during closing argument.

7. There was cumulative error.

DISCUSSION

1. *Trial court properly refused to recuse the entire District Attorney's office*.

Gray contends the trial court erred by denying his motion to recuse the entire Los Angeles County District Attorney's Office from prosecuting him. This claim is meritless.

a. *Proceedings below*.

Gray filed a pretrial motion seeking to recuse the entire District Attorney's Office on the ground Deputy District Attorney Bliss was one of the victims and would be called as a prosecution witness. The People opposed the motion, submitting a declaration from the trial prosecutor, F.M. Tavelman, which said he only knew Bliss in passing and that they had never worked in the same office. Tavelman stated he worked for the Crimes Against Peace Officers Section (CAPOS) of the Target Crimes Division, Bureau of Specialized Prosecution. CAPOS is responsible for handling the murder and attempted murder of peace officers. William Hodgman is the Head Deputy District Attorney who manages the division. Tavelman's office was in downtown Los Angeles, whereas "[a]t the time of the crimes alleged . . . , Deputy District Attorney Peter Bliss was assigned to the District Attorney's Hardcore Gang Division and stationed in the Pomona Branch office. The Hardcore Gang Division is managed by a Head Deputy other than William Hodgman."

Tavelman went on to state: "I have only met Deputy District Attorney Peter Bliss in passing, and we have never worked in the same office. I have never been assigned to the Hardcore Gang Division, nor the Pomona Branch office. I do not have interaction with him professionally or socially or indirectly through others with whom I do have interaction. [¶] In making decisions concerning the case, including but not limited to my filing decision, I have not spoken with Peter Bliss, except to the degree I would with any victim . . . ."

At the hearing on the recusal motion, Tavelman noted that, since filing his declaration, Bliss had been transferred from Pomona to downtown Los Angeles, where he was now in charge of preliminary hearings. Tavelman's office was in the building next door to Bliss's new assignment, but he did not have regular contact with Bliss.

Defense counsel argued recusal of the entire Los Angeles County District Attorney's Office was warranted because there was a conflict of interest. Since Bliss's credibility would be a key issue in the case and he was a deputy district attorney, Tavelman would feel a special obligation to protect him. Similarly, Tavelman would be

reluctant to reach any kind of plea bargain because Bliss believed Gray had tried to kill him.

The trial court denied Gray's recusal motion because of the size of the Los Angeles County District Attorney's Office, the fact Tavelman and Bliss did not have a close personal relationship, and the fact Gray was merely speculating about a widespread awareness of the case in the district attorney's office.

b. *Legal principles.*

The legal standard for recusing an entire district attorney's office is well-settled: "In 1980 the Legislature enacted section 1424, which provides, in relevant part, 'The motion [to recuse] shall not be granted unless it is shown by the evidence that a conflict of interest exists such as would render it unlikely that the defendant would receive a fair trial.'. . . While section 1424 does not specify whether the disqualifying conflict must be 'actual' or need only generate the 'appearance of conflict,' in either event, the conflict must be of such gravity as to render it unlikely that defendant will receive a fair trial unless recusal is ordered." (*People v. Conner* (1983) 34 Cal.3d 141, 147.) "In our view a 'conflict,' within the meaning of section 1424, exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner." (*Id*. at p. 148.) "In most circumstances, the fact one or two employees of a large district attorney's office[2] have a personal interest in a case would not warrant disqualifying the entire office. [Citations.]" (*People v. Vasquez* (2006) 39 Cal.4th 47, 57, fn. omitted.)

"Relief from an erroneous denial under section 1424 is available by pretrial writ petition. [Citations.] At least where, as here, the defendant did not seek such a writ, 'the government interest[] in conserving judicial and prosecutorial resources' [citation], given

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2 *Vasquez* pointed out that, "[a]ccording to the [Los Angeles County District Attorney] Web site, the office has a staff 'of approximately 1,962 includ[ing] 948 deputy district attorneys, 239 investigators, and 775 support personnel, comprising the largest local prosecutorial agency in the nation.' (<http://da.co.la.ca.us/> [as of July 10, 2006].)" (*People v. Vasquez, supra,* 39 Cal.4th at p. 57, fn. 2.)

constitutional force by the 'miscarriage of justice' standard that governs our review [citation], strongly militates against reversing on appeal without a showing of actual prejudice." (*People v. Vasquez, supra,* 39 Cal.4th at p. 68.) "The question, ultimately, is whether the threat to the integrity of criminal proceedings posed by participation of a prosecutor with a conflict of interest that before trial 'render[ed] it unlikely that the defendant would receive a fair trial' (§ 1424), but which in the event did not demonstrably affect the actual course of the proceedings, justifies a departure from the ordinary rule, grounded in the need for finality of judgments and conservation of judicial resources and embodied in article VI, section 13 of the California Constitution, that to obtain reversal a criminal appellant must show prejudice. At least under the circumstances of this case – where defendants failed to avail themselves of their pretrial remedy by filing a writ petition – we conclude no such departure is justified." (*Id*. at p. 70.)

On appeal, the Court of Appeal is " 'to determine whether there is substantial evidence to support the [trial court's factual] findings [citation], and, based on those findings, whether the trial court abused its discretion in denying the motion [citation].' " (*People v. Eubanks* (1996) 14 Cal.4th 580, 594.)

c. *Discussion.*

Gray argues his recusal motion should have been granted because of the important part Bliss played in the incident. Bliss testified he and Gray engaged in a shoot-out, a terrifying experience. Gray relies on *People v. Conner, supra,* 34 Cal.3d 141, and *People v. Jenan* (2006) 140 Cal.App.4th 782. In both of these cases a deputy district attorney had been directly involved in the criminal incident. In *Conner*, the prosecutor had run into the jury room, where the defendant was being held awaiting trial, to find the defendant holding a gun on a deputy sheriff. The defendant apparently shot at the prosecutor as the prosecutor fled. In *Jenan*, the defendants allegedly tried to dissuade an investigator employed by the district attorney's office from attending or testifying at a criminal proceeding, and a deputy district attorney had observed this. But these cases do not help Gray for two reasons: the trial courts exercised their discretion in favor of

granting recusal, and each district attorney's office was relatively small. (See *People v. Conner, supra,* 34 Cal.3d at p. 148 ["the felony division of the DA's office is composed of about 25 attorneys"]; *People v. Jenan, supra,* 140 Cal.App.4th at p. 793 ["a relatively small district attorney's office"].)

The opposite result has been reached where the district attorney's office is large. In *Trujillo v. Superior Court* (1983) 148 Cal.App.3d 368, the deputy district attorney had been prosecuting a murder case against the defendant. When a guilty verdict was announced, the defendant bolted for the courtroom door. The prosecutor tackled him and a violent struggle ensued. The defendant was strangling the prosecutor with his own necktie when help arrived. Crucial factors leading the trial court to deny a recusal motion included: the large size of the San Francisco District Attorney's Office, which had 65 to 70 felony prosecutors; that the case had been assigned to a prosecutor who worked in a different unit from the deputy district attorney witness; and, although the deputy district attorney had discussed the incident "with people in the office who asked about [it]," the "discussions 'quieted down very quickly' after the incident." (*Id.* at p. 370.)

In affirming the trial court's denial of recusal, *Trujillo* reasoned: "We consider it significant that in *Conner* the trial court recused the district attorney's office, while here the trial court refused to recuse. *Conner* emphasized that our role is only to review the trial court decision to determine whether it is supported by substantial evidence and also explained that its decision was based upon the combined effect of various factors present there. [Citation.]" (*Id*. at p. 373.)

In *Millsap v. Superior Court* (1999) 70 Cal.App.4th 196, the defendant was accused of soliciting the murder of two deputy district attorneys. Noting the size of the Los Angeles District Attorney's Office, "said to be the largest prosecutorial office in the nation[,]" the Court of Appeal held that, although the victims should not be allowed to prosecute the defendant, there was no reason to recuse the entire office. (*Id*. at p. 202.)[3]

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[3] Gray acknowledges the offices in *Conner* and *Jenan* were small, but argues his "is a unique case in that, in addition to Bliss, the other two victims were Los Angeles

Gray acknowledges that, not having sought a pretrial remedy by way of writ petition, he can obtain relief now only by demonstrating actual prejudice. He argues, "It is difficult, for the most part, to point to specific instances of prosecutor Tavelman's actions which overtly demonstrated an unfair conflict of prosecutorial conflict. [Citation.] However, a review of the record shows that at every turn the prosecutor gave no quarter toward appellant from charging to evidentiary issues."

But this is not the kind of prejudice our Supreme Court had in mind: "[S]ometimes defendants are able to show actual prejudice, or at least a strong probability of actual unfair treatment, as, for example, in *Ganger* [*v. Peyton* (4th Cir. 1967) 379 F.2d 709], where there was evidence the prosecutor 'offered to drop the assault charge if Ganger would make a favorable property settlement in the divorce action' [citation], or *State v. Eldridge* [(Tenn.Cr.App. 1997) 951 S.W.2d 775, 783], in which it was apparent that payment of a certain amount in settlement of the civil case 'would result in a favorable recommendation of the special prosecutors in the criminal matter.'. . . [I]n the case at bench it is claimed, and the Court of Appeal agreed, that the conflict of interest influenced [the prosecutor's] decision, after the first jury deadlocked, not to reduce her plea bargain demand from second degree murder to voluntary manslaughter. Although we conclude the record does not support such a finding [citation], this form of prejudice *could* be demonstrated on other facts. The possible prejudicial effects of a conflict of interest on the part of the prosecutor may be pervasive, but they are not necessarily untraceable." (*People v. Vasquez, supra*, 39 Cal.4th at p. 70.) Gray fails to show there was any such specific prejudice in the case at bar.

The trial court did not err in denying Gray's motion to recuse the entire Los Angeles County District Attorney's Office from prosecuting this case.

County police officers, crimes against who[m] are prosecuted by a specialized unit, [the] Crimes Against Peace Officers Section. While there was no evidence as to the size of this unit, it no doubt is smaller than the 25 person felony unit in *Conner*." Aside from the fact Gray is again speculating about facts not developed at trial, the exact size of Tavelman's unit is irrelevant because Bliss worked in an entirely different section.

2. *Trial court properly granted motion for joinder of counts*.

Gray contends the trial court erred by consolidating the 2005 incident and the 2006 incident for prosecution in a single case. This claim is meritless.

a. *Legal principles.*

Section 954 provides, in pertinent part: "An accusatory pleading may charge two or more different offenses connected together in their commission . . . under separate counts, . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. . . . " "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*People v. Bean* (1988) 46 Cal.3d 919, 938.)

" 'The law prefers consolidation of charges. [Citation.] Where . . . joinder is proper under section 954. . . . [a defendant] can predicate error in the denial of [a severance] motion only on a clear showing of potential prejudice. [Citations.] We review the denial of defendant's motion for an abuse of discretion, that is, whether the denial fell " 'outside the bounds of reason.' " [Citations.]' [Citation.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 574.)

"The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial. Thus, refusal to sever may be an abuse of discretion where '(1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all; and (4) any one of the charges carries the death penalty.' [Citation.]" (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.) "Cross-admissibility of evidence is sufficient but not necessary to deny severance." (*People v. Manriquez, supra,* 37 Cal.4th at p. 574.)

b. *Discussion*.

The consolidation here met the requirements of section 954 because the two charges were "connected together in their commission." (§ 954.) " 'Offenses "committed at different times and places against different victims are nevertheless 'connected together in their commission' when they are . . . linked by a ' "common element of substantial importance." ' [Citations.]" ' [Citation.] Although the murder itself occurred almost two years prior to defendant's escape, the offenses were nonetheless connected because the escape occurred as defendant was being returned to 'lock-up' following his arraignment on the murder charge. The apparent motive for the escape was to avoid prosecution for the murder." (*People v. Valdez* (2004) 32 Cal.4th 73, 119.)

Pointing out both incidents here involved victims who were police officers, the trial court relied on cases holding section 954 is satisfied if the charges involved victims of the same type. (See *People v. Leney* (1989) 213 Cal.App.3d 265, 269 [victims were "male juveniles"]; *People v. Poon* (1981) 125 Cal.App.3d 55, 69, disapproved on another ground in *People v. Lopez* (1998) 19 Cal.4th 282, 292) [victims were "young girl[s]"].)

Gray argues this analysis is incorrect because Officer Luemmen was not a victim of the obstruction charge. He is wrong. The statute itself defines the officer as the victim. (See § 148, subd. (e) ["A person may be convicted of multiple violations of this section if more than one public officer, peace officer, or emergency medical technician are victims."]; see, e.g., *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1534 [in context of unanimity instruction issue: "prosecutor's election to consider 'everything' that defendant did after the initial attempt to arrest him as the section 148 violation meant that every officer whom defendant resisted was a victim of this charge"].)

The trial court also found joinder was proper under section 954 because evidence of the first incident was cross-admissible, under Evidence Code section 1101, in order to show Gray's motive or intent during the second incident. Gray argues the motive justification fails because "there was no connection whatsoever between the misdemeanor resisting arrest and the shooting which occurred nearly a year later."

Not so. The evidence showed Luemmen was well-acquainted with Gray and that Gray knew it. Therefore, it could reasonably be inferred Gray knew there was probably an outstanding arrest warrant stemming from the first incident and this gave him a motive for his conduct during the second incident.

Regarding intent, Gray argues there was no similarity between the two events because in the first incident, the officer was in full uniform in a plainly marked patrol car, whereas the officers in the second incident wore "indistinctive clothing, [and were driving] an unmarked vehicle." Gray argues that, during the second incident, he was "not the focus" and he simply drove off "after seeing [his companion] pursued by an unknown, apparently aggressive and armed, individual." But this is Gray's version of what happened and that's why this evidence was cross-admissible. Freeman testified he called out to Gray by name and turned on the patrol car's flashing red and blue lights; therefore, evidence that Gray had previously tried to evade the police was highly probative.

The trial court did not err by consolidating these cases. (See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1129, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 ["Cross-admissibility ordinarily dispels any inference of prejudice."].)

3. *Evidence of Gray's 2003 arrest properly admitted*.

Gray contends the trial court erred by allowing the prosecution to introduce evidence about a 2003 incident during which he was arrested at his uncle's house. This claim is meritless.

a. *Proceedings below*.

Detective Freeman testified he had had several past contacts with Gray. On one occasion, in either 2002 or 2003, Freeman was part of a team serving a search warrant at Gray's uncle's house. When they knocked, Gray answered the door and then immediately fled. Freeman chased Gray into a bathroom and took him into custody.

b. *Legal principles.*

"Evidence of prior criminal acts is admissible 'when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge . . .),' but not to prove the defendant carried out the charged crimes in conformity with a character trait. (Evid. Code, § 1101.)" (*People v. Lewis* (2001) 25 Cal.4th 610, 636-637.) "A trial court's ruling admitting evidence of other crimes is reviewable for abuse of discretion." (*People v. Hayes* (1990) 52 Cal.3d 577, 617.)

"We have long recognized 'that if a person acts similarly in similar situations, he probably harbors the same intent in each instance.' " (*People v. Robbins* (1988) 45 Cal.3d 867, 879; see *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1049 [past incident relevant to prove current intent]; *People v. Goodall* (1982) 131 Cal.App.3d 129, 142 [defendant's presence at past drug scene admissible to show familiarity with PCP and thus guilty knowledge and intent with respect to charged offense]; *People v. Hill* (1971) 19 Cal.App.3d 306, 319-320 [evidence of defendant's subsequent narcotics offense admissible to show defendant intended to sell drugs]; see also *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 ["The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent."].)

"A trial court's exercise of discretion under Evidence Code section 352 will not be reversed unless it 'exceeds the bounds of reason, all of the circumstances being considered.' [Citation.]" (*People v. Tran* (1996) 47 Cal.App.4th 759, 771.)

c. *Discussion.*

The trial court did not abuse its discretion because this evidence went to show that, during the September 2006 incident, Gray would have known Freeman was a police officer and that's why he fled in the SUV. Gray argues the evidence was cumulative on this point because Freeman testified about other contacts between the two of them, including the incident in which Freeman drove Gray to the police station after finding him hiding in an attic. But, as the trial court pointed out, the prosecution had to convince the jury on the basis of circumstantial evidence alone that Gray knew Freeman, so the more encounters they had, the more reasonable the proposed inference.

Gray complains the trial court admitted this evidence despite his willingness to "stipulate to the fact of that contact in order to avoid its prejudicial aspects." But a mere stipulation to the fact Gray and Freeman had a "contact" in 2003 does nothing to convey the encounter's qualities, novelty, duration, etc., relevant factors for inferring Gray must have recognized Freeman during their September 2006 encounter.

The trial court did not err by allowing the prosecution to introduce evidence about the 2003 incident.

4. *There was sufficient evidence Gray's attempted murder of Detective Freeman was premeditated.*

Gray contends there was insufficient evidence to prove his attempted murder of Detective Freeman was premeditated. This claim is meritless.

a. *Legal principles.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding

does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

People v. Anderson (1968) 70 Cal.2d 15, 26-27, a murder case, discussed the following types of premeditation and deliberation evidence[4]: "The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing – what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [Citation.]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type

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[4] "We do not distinguish between attempted murder and completed first degree murder for purposes of determining whether there is sufficient evidence of premeditation and deliberation. [Citation.]" (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462, fn. 8.)

(1) or (2). [¶] Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)."

The *Anderson* factors do not establish normative rules, but instead provide guidelines for a reviewing court's analysis. (*People v. Sanchez* (1995) 12 Cal.4th 1, 32, disapproved on another ground in *People v. Doolin*, *supra*, 45 Cal.4th 390, 421, fn. 22.) Thus, the *Anderson* factors are not a sine qua non to finding deliberation and premeditation, nor are they exclusive. (*Ibid*; *People v. Davis* (1995) 10 Cal.4th 463, 511 [*Anderson* factors are descriptive, not normative]; *People v. Raley* (1992) 2 Cal.4th 870, 886 [when evidence of all three *Anderson* factors is not present, appellate courts look for either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing].)

b. *Discussion*.

Gray argues there was no evidence the attempted murder of Freeman was premeditated: "The entire incident was completely happenstance and spur of the moment. Rather than planning any sort of attack, appellant took great steps to avoid any confrontation." Gray's theory is that at each stage of the encounter he backed away from any confrontation; for instance, he initially drove away from the officers and, in the alley, he jumped a fence and ran from Freeman. He asserts, "Only when trapped in the alley did he shoot, and even then, it was only after Freeman and Bliss opened fire . . . . There was no lying in wait or planned ambush by appellant. He did everything he could to avoid a confrontation and only shot when fired upon."

However, stripped of Gray's self-defense theory, which the jury did not have to believe, his actions can easily be read to demonstrate premeditation and deliberation. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1080 [" '[t]he process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may

follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . . " ' "].)

There was evidence showing Gray recognized Freeman and well knew he was not being attacked by some maniac. But rather than surrender to the police, Gray chose to take his gun and flee. As the Attorney General points out, "It just so happened that the deadly force was not required until Detective Freeman caught up to [Gray] in the alley and his escape options were restricted. At that point, appellant did not surrender. Rather, he walked purposefully in the direction of the police car, with his gun raised. He subsequently fired several shots at the police car from a distance of 10 to 12 feet." We agree with the Attorney General's argument the evidence showed Gray had "a plan to use deadly force if necessary to avoid apprehension."

There was evidence here of all three *Anderson* factors: motive, planning and manner of attempted killing. Gray had two motives for trying to kill Freeman. He was an ex-felon in possession of a gun and he knew he probably had an outstanding arrest warrant stemming from the November 2005 incident. Taking the gun with him when he abandoned the SUV tended to show he had a plan to avoid apprehension by killing any police officer who got in his way.[5] This, in turn, tended to show that when he walked toward the police car in the alley with his gun raised, he was acting with premeditation and deliberation. And, by firing a semiautomatic weapon multiple times in Freeman's direction from a fairly close distance, Gray engaged in a manner of attempted killing that tended to show premeditation and deliberation. (See *People v. Silva* (2001) 25 Cal.4th 345, 369 [multiple shotgun wounds inflicted on victim indicated manner of killing

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[5] In *People v. Salas* (1972) 7 Cal.3d 812, the defendant had brandished a gun while robbing a bar and threatened to kill the victims if they got off the floor. While fleeing from this robbery, the defendant killed a deputy sheriff. *Salas* held the jury "could reasonably have inferred that defendant from the beginning planned to kill anyone interfering with the successful perpetration of the robbery and could reasonably conclude that defendant killed [the deputy] in accordance with that plan with the purpose of avoiding apprehension and a long prison term." (*Id*. at pp. 824-825.)

consistent with premeditation and deliberation]; *People v. Bolin* (1998) 18 Cal.4th 297, 332 [multiple gunshot wounds was manner of killing tending to show premeditation and deliberation].)

There was sufficient evidence to sustain Gray's conviction for the premeditated attempted murder of Detective Freeman.

5. *There was sufficient evidence Gray assaulted Detective Lange*.

Gray contends there was insufficient evidence to sustain his conviction for assaulting Detective Lange with a semiautomatic firearm. This claim is meritless.

Gray argues the evidence was insufficient because it showed he did not shoot at Lange or even point his gun at him. Rather, he already had the gun in his hand when he turned to face Lange, and Lange testified Gray was holding the gun pointed downward at a 45 degree angle.

But, in the circumstances of this case, that evidence was sufficient to sustain the conviction. Section 240 provides: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." As our Supreme Court explained a long time ago, "Holding up a fist in a menacing manner, drawing a sword, or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault. So, any other similar act, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence against the person of another, will be considered an assault. . . . [¶] . . . [¶] When there is any competent evidence before the jury to show the intent to commit an assault, it is for them to determine the question of intention." (*People v. McMakin* (1857) 8 Cal. 547, 548.)

"Assault with a deadly weapon can be committed by pointing a gun at another person [citation], but it is not necessary to actually point the gun directly at the other person to commit the crime." (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263 [where defendant was confronted by two officers and drew loaded handgun with intent to shoot, he assaulted both officers even though he only managed to point the gun at one of the officers before they both shot him]; see also *People v. McMakin, supra,* 8 Cal. at pp. 547,

548 [where defendant drew "a Colt's revolver, which he held in a perpendicular line with the body of [the victim], but with the instrument so pointed, that the ball would strike the ground before it reached" the victim, this constituted an assault because defendant "put himself in a position to use the weapon in an instant, having only to elevate the pistol and fire"]; *People v. Thompson* (1949) 93 Cal.App.2d 780, 782 [assault committed where defendant pointed gun toward two deputies, aiming between them and pointing gun downward: while defendant "did not point the gun directly at them or either of them, it was in a position to be used instantly"].)

As the Attorney General argues: "The jury could . . . reasonably infer that as appellant stood facing the detectives with his gun at a downward 45-degree angle, he intended to shoot in Detective Lange's direction and had his gun positioned to do so instantly. At the time, appellant had made no effort to surrender and had just opened fire on Detective Freeman and Bliss." "Just because Detective Lange managed to fire his weapon before appellant could shoot him did not relieve appellant of criminal liability."

There was sufficient evidence to sustain the conviction for assault with a semiautomatic firearm.

6. *There was no prosecutorial misconduct.*

Gray contends the prosecutor committed misconduct by inadvertently informing the jury he had suffered three prior convictions. This claim is meritless.

After the prosecutor completed the initial portion of his closing argument, defense counsel advised the trial court one of the slides in the prosecutor's power point presentation indicated that, in connection with count 8, possession of a firearm by a felon, Gray had suffered three prior convictions. Noting the evidence in the case, pursuant to stipulation, was that Gray had committed only one prior felony conviction, defense counsel asked for a mistrial. The prosecutor acknowledged the mistake, saying it had been inadvertent but argued the words "Three Priors" had been on the screen for only a short period of time.

The trial court denied the mistrial motion, deciding a jury instruction would cure the problem. The court subsequently instructed the jury about the erroneous reference to three priors: "That is not accurate. . . . I have already advised you . . . the previous felony conviction has already been established by stipulation so that no further proof of that fact is required. You must accept as true the existence of this previous felony conviction. You must not consider such evidence for any other purpose. . . . [T]he argument of counsel is not evidence. You've heard the evidence. There is the stipulation. And I've already advised you to the extent that you may have seen [the power point reference to three priors], that is inaccurate, incorrect information [that] was placed there by mistake."

a. *Legal principles.*

Conduct by a prosecutor that does not render a criminal trial fundamentally unfair constitutes prosecutorial misconduct under California law only if it involves " ' " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " ' " (*People v. Hill* (1998) 17 Cal.4th 800, 819.) "When we review a claim of prosecutorial remarks constituting misconduct, we examine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief complained of. [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 689.)

As a general rule, "a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if ' "an admonition would not have cured the harm caused by the misconduct." ' " (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.)

b. *Discussion*.

While acknowledging there had been an innocent mistake, Gray argues: "[A]lthough the jury did not learn the facts of the prior convictions, knowing that appellant had multiple prior convictions certainly could cast substantial doubt in the jurors' minds about the truth of appellant's claims that he did not know the detectives were police officers and that he fired in self-defense." Gray asserts the trial court's admonition did not cure the mistake because it is unrealistic to expect juries to set aside their knowledge of highly damaging evidence.

But, as the Attorney General points out, jurors are presumed to follow such admonitions. (See *People v. Dickey* (2005) 35 Cal.4th 884, 914 [no need to decide if prosecutor's remark constituted improper vouching because defense objection was sustained and jury admonished]; *People v. Harris* (1994) 9 Cal.4th 407, 426 [" '("The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant").'].)"

Although improperly "exposing a jury to a defendant's prior criminality presents the possibility of prejudicing a defendant's case" (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580), "[a] trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial." (*People v. Bolden* (2002) 29 Cal.4th 515, 555; see *People v. Price* (1991) 1 Cal.4th 324, 430-431 [prosecution witness's improper disclosure that defendant admitted having spent last 11 years in prison was cured by admonishment and mistrial motion was properly denied].)

The trial court did not abuse its discretion by concluding Gray's chance of receiving a fair trial had not been irreparably damaged.

7. *There was no cumulative error.*

Gray contends that, even if harmless individually, the cumulative effect of these claimed trial errors mandates reversal of his convictions. Because we have found no errors, his claim of cumulative error fails. (See *People v. Seaton* (2001) 26 Cal.4th 598, 639; *People v. Bolin, supra*, 18 Cal.4th at p. 335.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.